

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1232

DOCKET NO.

76-1232

United States Court of Appeals
For the Second Circuit

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P/s

UNITED STATES OF AMERICA,

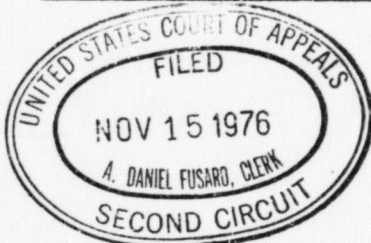
Plaintiff-Appellee,

-against-

W. BALDWIN DROMS,

Defendant-Appellant.

BRIEF AND APPENDIX FOR DEFENDANT



PARISI, DE LORENZO, GORDON
& PASQUARIELLO, P.C.
Attorneys for Defendant
201 Nott Terrace
Schenectady, New York
12307

THOMAS E. DE LORENZO,
Of Counsel.

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PRELIMINARY STATEMENT

The verdict and judgment herein appealed from was rendered in the District Court for the Northern District of New York before the Honorable James T. Foley, Chief Justice.

THE ISSUES

The issues presented by this appeal are:

1. Whether the prosecution sustained its burden of proof by showing that the defendant-appellant violated Title 28 U.S.C. Section 7206(1) by transferring an asset of substantial value for less than fair and adequate consideration despite his representation on the Offer in Compromise Form 433 that he had not in fact transferred an asset of substantial value for less than fair and adequate consideration.

2. Whether the trial judge erred in not deciding the issue of transfer of a substantial asset for less than fair and adequate consideration as a matter of law in favor of defendant-appellant.

3. Whether the substantive law of the state where the criminal act is alleged to have occurred is controlling and to be followed by the Trial Court in the absence of federal law on the subject of transfer of a stock certificate.

4. Whether the Trial Court erred in letting the issue of transfer of a substantial asset for less than fair and adequate consideration be determined by the jury together with the issue of understatement of income and whether that

error was sufficiently prejudicial to the defendant-appellant to require a reversal of the verdict or a new trial.

STATEMENT

Defendant-appellant was charged with subscribing a document under the penalties of perjury which he allegedly knew to be false in two (2) material respects. The document was an Offer in Compromise (Government Exhibit "3") which was subscribed on the 28th day of April, 1969.

The indictment charges the defendant-appellant, in its sole count, with having understated his annual income for the year 1968 and with having transferred an asset of substantial value for less than fair and adequate consideration despite the representation on the form that no transfer of substantial value for less than fair and adequate consideration had taken place. A five (5) day trial proceeded on the indictment. Defendant-appellant moved to dismiss that portion of the indictment that related to the transfer of a substantial asset for less than fair and adequate consideration following the completion of the prosecution's proof. The Court considered the motion in chambers (App. II) and accepted briefs from the prosecution and the defendant on the question presented. The Court rendered its decision on that motion (R. 653-656) denying the relief requested by the defendant and later allowed the jury to consider the matter as a question of fact. The jury considered all the issues and rendered its verdict against the defendant. The defendant-appellant appeals from the verdict and the judgment entered thereon.

DISCUSSION OF THE EVIDENCE

Defendant-appellant submitted an Offer in Compromise to the Internal Revenue Service which was subscribed on the 28th day of April, 1969. This was the second Offer in Compromise submitted by the defendant-appellant, the first one having been submitted the preceding year (Government Exhibit "2") and having been rejected after investigation by the Internal Revenue Service (R. 165). The articulated purpose for the second Offer in Compromise was to present the Internal Revenue Service with an up-dated picture of the financial status of the defendant-appellant which would include his 1968 income (R. 258).

During the years preceding the Offer in Compromise, the defendant-appellant was in a sense purchasing the subject asset known as Prestige Realty of the Capital District. The terms of his agreement were that the previous owner was to withdraw Ten Thousand (\$10,000.00) Dollars over a period of time from the income to the corporation at which time he would transfer legal title to the defendant-appellant (R. 340). During the period that this money was to be withdrawn, the defendant-appellant managed and operated the corporation. In May of 1968, the previous operator of the business, had withdrawn the total amount of Ten Thousand (\$10,000.00) Dollars and thereafter transferred all the shares of stock in said corporation to the defendant-appellant on November 1, 1968 (R. 349, 350). The following day, the defendant-appellant endorsed

a stock certificate of the total shares outstanding in the corporation to Martha Spoor, who was a co-worker with the defendant-appellant during the years preceding the transfer. Martha Spoor indicated that she never received the endorsed stock certificate during the period contemplated by the indictment (R. 526, 527, App. 1).

Throughout the period testified to at trial, the defendant-appellant was using a public accountant, one Anthony DiSorbo, as his accountant for his business and personal purposes. Said accountant was not permitted to practice before the Internal Revenue Service and therefore the defendant-appellant used the services of a certified public accountant's firm for processing the two Offers in Compromise. The public accountant was responsible for the personal and business returns of the defendant-appellant. The income for the year 1968 recited in the Offer in Compromise was not the same as that set forth in the personal income tax returns prepared by the public accountant. However, the public accountant, a prosecution witness, was recomputing the personal income tax figures for the defendant-appellant while the trial was proceeding and realized that he had incorrectly stated the defendant-appellant's income on his income tax return (R. 539 forward).

The second Offer in Compromise, provides the basis for this indictment. The second Offer in Compromise was prepared by a law clerk-accountant in the employ of the C.P.A. Testimony adduced from two sources indicated that the two Offers in Compromise were identical in most items except for the income figure which differed (R. 212-241, 285-286).

The testimony and the exhibits in this trial were complex and technical. By failing to dismiss that portion of the indictment that related to the transfer of a substantial asset for less than fair and adequate consideration, the Court added to the complex nature of the issues to be decided by the jury. Their consideration of the entire indictment including that portion which should have been stricken and dismissed as a matter of law, served to complicate matters further which aided the jury in reaching the verdict that it did.

Two major portions of the evidence produced at the trial created extensive conflict. The public accountant which was responsible for stating the income of the defendant-appellant on his income tax return for 1968, admitted in his testimony that he had made extensive errors in the computation and that the actual income of the defendant-appellant for the year 1968 would differ from that reported on his income tax return. The vast portion of the income attributable to the defendant-appellant was not in the form of salary or wages from his employment, but was rather imputed income from payments made on outstanding obligations by the corporation that employed him. The testimony of the law clerk-accountant who prepared the second Offer in Compromise indicated that all he requested of the defendant-appellant was his W-2 form for the year 1968. The amount showing total income paid in the form of salary and wages on the W-2 form for 1968 was placed on the Offer in Compromise as the exclusive element of income to the defendant-appellant for the year 1968.

The second conflict in the testimony was between the law clerk-accountant and the defendant-appellant. The former individual, one John Dennis, testified to his having a personal meeting with the defendant-appellant in which they together prepared the second Offer in Compromise (R. 304). The defendant-appellant testified that prior to meeting the law clerk-accountant in the Courthouse at the outset of the trial, that he had never personally met Mr. Dennis (R. 683) and that he was only requested to appear at the office of Mr. Dennis to sign and subscribe the second Offer in Compromise. Mr. Dennis was called by the prosecution to give additional testimony following the completion of the defendant-appellant's defense. There was then introduced a letter communication from Mr. Dennis to the defendant-appellant (Government Exhibit "26") from which an inference might be drawn that Mr. Dennis had never personally conferred with the defendant-appellant in contradiction of his prior testimony.

ARGUMENT

POINT I

THE PROSECUTION FAILED TO SUSTAIN ITS BURDEN OF PROOF AT THE TRIAL OF THIS PROCEEDING BY FAILING TO SHOW BY COMPETENT PROOF THAT THE DEFENDANT-APPELLANT SUBSCRIBED THE STATEMENT OF FINANCIAL CONDITION AND OTHER INFORMATION-FORM 433 UNDER THE PENALTIES OF PERJURY AND IN CONTRAVENTION OF THE REPRESENTATIONS ON SAID FORM THAT THE APPELLANT HAD IN FACT DISPOSED OF AN ASSET OF SUBSTANTIAL VALUE FOR LESS THAN FAIR AND ADEQUATE CONSIDERATION.

As has been set forth in the statement and description of evidence above, the only evidence submitted by the prosecution on the question of transfer of an asset having a value of over Five Hundred (\$500.00) Dollars for less than adequate and fair consideration was the testimony of Martha Spoor (R. 504-534, App. 1). In the course of her testimony, the witness indicated that she was employed by Prestige Realty of the Capital District Corporation initially as a sales person and later as a broker (R. 505-507). The witness acknowledged having seen the stock certificate of the Prestige Realty of the Capital District Corporation with a completed transfer endorsement to her on the reverse side dated the 2nd day of November, 1968. (Government Exhibit "14"). She also testified as to the value of the consideration she believes that she had remitted to the defendant-appellant for her apparent ownership interest in the corporation. (R. 508 forward). However, when asked what she did with the stock certificate after she received it, the witness testified (R. 526) that she didn't even know that she had received apparent ownership of the corporation, nor had she been aware that a transfer had taken place. Upon inquiry from the Court whether or not she had possession of the stock certificate she testified that she never saw it, apparently prior to presentation to her at the Grand Jury proceedings. On cross examination, the witness testified that she never received or had delivered to her the subject stock certificate (R. 527).

This was the only evidence presented by the prosecution to substantiate that part of the indictment that a transfer of an asset having a value of over Five Hundred (\$500.00) Dollars had been made for less than fair and adequate consideration in contravention of the representation on the Offer in Compromise of April 28, 1969. The testimony of the defendant-appellant further substantiated the fact that Martha Spoor could not have possibly received the stock certificate for some years following April 28, 1969, as the stock certificate was in the possession of an unrelated third-party (R. 721 forward).

No other persons testified with reference to the transfer of the stock certificate. The prosecution did not feel that it was necessary to call the accountant who had possession of the stock certificate for a number of years to the stand. Without any independent proof of delivery of the stock certificate endorsed to the order of Martha Spoor, there was no showing of any completed transfer of any interest in the subject corporation. The question of the necessity of a completed delivery will be treated in Point II and III below.

The prosecution in a criminal proceeding has a heavy burden placed upon itself to prove every element of an indictment charging a crime against a defendant beyond any reasonable doubt. The case law is replete with references to the burden of proof to be sustained by the prosecution. U.S. v. Masiello, 235 F. 2d 279 (2nd Cir.), Christoffel v. U.S., 338 U.S. 84.

In the absence of adequate proof on a material element of a criminal indictment, that portion of the indictment as a matter of law must fail for insufficiency. U.S. v. Nardone, 127

F. 2d 521, Harold v. Territory, 169 Fed. 868. The appellant maintains that upon all the competent evidence adduced by the prosecution, they have failed to sustain their burden of proof with reference to that portion of the indictment that alleges a transfer of an asset whose value exceeds Five Hundred (\$500.00) Dollars for less than fair and adequate consideration. The Court must dismiss that portion of the charge against the defendant-appellant where the prosecution presents insufficient evidence to support a conviction. Duff v. U.S., 185 Fed 101.

POINT II

THE COURT ERRED IN FAILING TO MAKE A DETERMINATION IN FAVOR OF THE DEFENDANT-APPELLANT UPON MOTION TO DISMISS THAT PART OF THE INDICTMENT UPON WHICH THE PROSECUTION FAILED TO SUSTAIN ITS BURDEN OF PROOF AS A MATTER OF LAW AND INSTEAD ALLOWED THE JURY TO DETERMINE THAT PORTION OF THE INDICTMENT AS A QUESTION OF FACT.

The attorney for the defendant-appellant raised the issue of adequate proof of delivery of the subject stock certificate by means of a motion following the completion of the prosecution case (R. 617-667, App. II). The Court heard all arguments from the attorney for each side and allowed each attorney to research the applicable law and present it to the Court. The fact that delivery was not proved by the prosecution is made evident by the attorney for the prosecution stating (R. 623) he was not cognizant of the requirement of proof of the element of delivery to effectuate a proper transfer of a stock certificate.

Cases were produced by both attorneys to support their positions. The cases produced by the prosecution were all Tax Court cases or appeals of Tax Court cases. However, each of these cases fails to consider the most important proposition in this entire trial that this is not a case involving a question of tax liability but is rather a case involving criminal liability for alleged fraudulent statements. There was no issue before the Trial Court nor is there one on this appeal that the defendant in some manner avoided a tax liability.

The defendant-appellant presented to the Court the case of In Re Broomhall, Killough & Co., Inc., 47 F. 2d 948 (S.D., New York 1930) which was a federal Court holding that dealt with a statute of the New York Personal Property Law that has been perpetuated and replaced by Uniform Commercial Code Section 8-309. The case presented was a federal case in which reference to the delivery provisions of the New York substantive law were used in determination of a question in a bankruptcy proceeding. The Court held that the placing of the stock of a corporation in names of the potential transferees without any delivery was insufficient to constitute a transfer of the shares within Section 162 of the Personal Property Law of the State of New York (substance now contained in Section 8-309 of the Uniform Commercial Code).

Also supporting the defendant-appellant's position was the statutory law of the State of New York contained in Article 8 of the Uniform Commercial Code. This particular Article,

as well as the other Articles of the Uniform Commerical Code, is the prevailing statutory law in the overwhelming number of state jurisdictions in the United States. All but a few number of states have adopted the Uniform Commerical Code with a minor number of variations. The controlling statute placed before the trial judge was 8-309 of the Uniform Commerical Code which provides:

An indorsement of a security whether special or in blank does not constitute a transfer until delivery of the security on which it appears or if the indorsement is on a separate document until delivery of both the document and the security.

Based upon said statute, and considering the entire case presented by the prosecution, there was no testimony adduced that delivery of the endorsed stock certificate was ever made to Martha Spoor.

The Court had before it, upon consideration of this motion, several cases on both sides of the issue, none of which was in exact point with the subject proceeding. All the cases dealt with non-criminal proceedings in Federal Court. But of all the cases, In re Broomhall, Killough & Co., Inc., supra, was the only case that interpreted the question outside the context of a tax proceeding so that it might be given general application. Other than these cases, the Court had the statute mentioned above. Despite the clear wording of the statute, the Court in its decision (R. 653-656, App. I) held that there was sufficient evidence in the testimony of Martha Spoor to allow this matter to be determined by the jury. The Court did

not address itself to the applicability or lack of applicability of the section of the Uniform Commercial Code cited above. The Court relied on the Ginsberg v. Commissioner of Internal Revenue, 305 F. 2d 664, one of the tax proceedings, to indicate that delivery of the endorsed stock certificate to an agent of the transferor might be concluded as being adequate delivery to the transferee for taxing purposes.

The Court rendered its decision without allowing the attorney for the defendant-appellant to respond to the cases raised by the prosecution and the Ginsberg case suggested by the Court. Had the attorney for the defendant-appellant been aware of the reliance by the Court on the position of transferring the stock certificate to the transferee by depositing the certificate with an agent of the transferor, the defendant-appellant would have provided further New York State statutes that would overcome that position. Reference is now made to other statutes contained within Article 8 of the Uniform Commercial Code with respect to what constitutes delivery within the meaning of Section 8-309 of the Code and whether the accountant who held the endorsed stock certificate could be considered a transfer agent sufficient to vest ownership of the certificate in the transferee. Section 8-313 of the Uniform Commercial Code sets forth the only situations in which a stock certificate may be delivered in the State of New York. The statute, in pertinent part, provides:

- (1). Delivery to a purchaser occurs when
 - (a). He or a person designated by him acquires possession of a security;
or
 - (b). His broker acquires possession of a security specially endorsed to or issued in the name of the purchaser;...

The testimony of Martha Spoor indicates that she was unaware of the whereabouts of the endorsed stock certificate so there was a failure of proof that the accountant for the transferor, the defendant-appellant, was in fact a designated agent of the transferee. No interpretation of the evidence before the Court would allow one to arrive at the conclusion that the accountant, Mr. Parisi, was a designated agent of Martha Spoor.

Under subdivision (b) above, it might be inferred that the accountant was a broker of one of the parties to the alleged transfer of the stock certificate. However, Section 8-303 of the Uniform Commercial Code defines a broker as being what is commonly known as a stock broker. The accountant may not be inferred to be a broker within the meaning of the Uniform Commercial Code.

Therefore, based upon the relevant sections of Article 8 of the Uniform Commercial Code, delivery of the endorsed stock certificate to the accountant did not constitute delivery to the transferee (8-313) either by transfer to an agent of the transferee or by transfer to a broker (8-303).

Upon the appropriate substantive law dealing with the issue which is directly in point to the situation presented by the testimony of the prosecution's witness, and upon the

failure of the prosecution to produce any competent evidence to prove that in fact delivery under any construction of the appropriate statutes took place to the alleged transferee, the lower Court erred in failing to dismiss the portion of the indictment relating to the alleged transfer of the asset for less than full value. This issue should not have been presented to the jury in the form of a question of fact when no facts satisfied the legal definitional requirements of delivery under the applicable substantive law.

POINT III

IN THE ABSENCE OF FEDERAL LAW RELATIVE TO COMPLETION OF TRANSFER OF A STOCK CERTIFICATE, THE SUBSTANTIVE LAW OF THE STATE WHERE THE TRANSACTION OCCURED IS CONTROLLING AND BINDING ON THE FEDERAL DISTRICT COURT.

In civil litigation in the Federal Court system, when an issue is raised upon which there is no federal statutory authority or federal common law, the Court refers to the substantive law of the state where the issue took place for the appropriate resolution of the issue. 28 U.S.C., Section 1652 (Rules of Decision Act). This statute has no counterpart in the Federal Rules of Criminal Procedure.

This Court must decide whether the statutory laws of the State of New York are determinative and must be considered in a situation where the federal government has not made a legislative pronouncement. If the state statutory law is con-

trolling then the lower Court erred in not applying said statutes and in not deciding the dismissal motion raised by the defendant-appellant in his favor.

The area of federal law in which the cases have developed that state law controls as to the substantive aspects of a statutorily defined crime in the absence of federal law on the issue, is concerning corporate existence and criminal liability. In U.S. v. Seaboard Coastline Railroad Company, 326 F. Supp. 897 (D.C. Fla.), a successor corporation was charged with criminal liability for the acts of its two constituent predecessor corporations which no longer had legal existence under state law. The Court held that the question of corporate existence is determined by the law of the state in which the corporation exists and the successor corporation would not be held accountable for the violation of federal statute by virtue of the state law. In U.S. v. Brakes, Inc., 157 F. Supp. 916 (S.D., N.Y.) a similar question of corporate existence and criminal accountability was raised. The Court noted that the Federal Rules of Civil Procedure provide that the corporate capacity to sue or be sued was governed by state law. The Court noted that there was no analogous rule in the Federal Rules of Criminal Procedure and therefore turned to state law to determine whether or not the corporation remained in existence for criminal accountability.

The case of Wolder v. Commissioner of Internal Revenue, 493 F. 2d 608, cited by the prosecution in the argument of the

motion in the Trial Court, substantiates the position that a Federal Court will look to the laws, either statutory or common law, of the state to determine the legal characterization of an issue. The Court states at 493 F. 2d 608, 612, "New York law does, of course, control as to the extent of the taxpayer's legal rights to the property in question, but it does not control as to the characterization of the property for federal income tax purposes." The Court recognizes and acknowledges the binding effect of the state law determination on the property issue. This is only modified to the extent of the federal legislation on the subject. In the instant situation before this Court on appeal, there is no federal legislative pronouncement that in any way varies the statutory state law bearing on the subject of transfer of a stock certificate.

Despite the fact that there is no federal legislative statement similar to 28 U.S.C. Section 1652 for criminal matters, the Federal Court holdings clearly indicate that in the absence of federal law on a given subject, the substantive law of the state is controlling. It was therefore, incumbent upon the trial justice to apply Article 8 of the Uniform Commercial Code of the State of New York in deciding the motion made by the defendant-appellant. The Court's failure to apply said statutes and rule as a matter of law that the prosecution did not sustain its burden of proof with reference to transfer of the corporate asset, was error requiring and necessitating reversal of defendant-appellant's conviction.

POINT IV

THE CONSIDERATION BY THE JURY OF THE ELEMENT OF TRANSFER OF THE ASSET FOR LESS THAN FULL VALUE TOGETHER WITH THE OTHER ELEMENT OF THE INDICTMENT CHARGING UNDERSTATEMENT OF INCOME WAS HIGHLY PREJUDICIAL AND CONSTITUTED REVERSIBLE ERROR.

As is indicated in the section entitled Discussion of the Evidence, supra, there were serious differences presented to the jury with reference to two significant portions of the trial. The first was the vacillation of the public accountant who handled the personal and corporate matters of the defendant-appellant. The jury was asked to determine whether the defendant-appellant understated his 1968 income on his Offer in Compromise dated April 28, 1969 in light of the gross income reported on his income tax return for the year 1968 as prepared by the public accountant. However, the public accountant, at the very time of trial, was recomputing the defendant-appellant's 1968 annual income and determined that he had made serious mistakes in the preparation of the personal return for that year. This is significant, because all of the income attributable to the defendant-appellant on his income tax return over the amount on his W-2 was imputed income from personal items having been paid through means of the corporation. The Offer in Compromise in question only recited the defendant-appellant's income as reflected on his W-2 form.

The second serious question before the jury was whether to believe the testimony of the defendant-appellant or that of the law clerk-accountant with reference to the preparation of the second Offer in Compromise. The law clerk-accountant testified that he had a personal appointment and interview with the defendant-appellant and the defendant-appellant testified that he had never met the law clerk-accountant until meeting him in the hallway once the trial of this proceeding began. Also to be considered is the testimony of John Dennis initially with his rebuttal testimony. A copy of a letter to the defendant-appellant was introduced into evidence as Government Exhibit "26" and the contents of that letter were read into the record (R. 789). The letter casts serious doubt on the original testimony of John Dennis, in that it recited that he had received information from the defendant-appellant by telephone and that the W-2 was forwarded to him by mail. There was no mention of personal contact with the defendant-appellant in said letter, despite the original testimony of the law clerk-accountant.

The jury had a great burden in resolving these inconsistencies and defects in the prosecution case. The trial Judge also called upon the jury to make a determination as to whether or not the defendant-appellant transferred an asset of substantial value, for less than adequate and fair consideration, without so indicating on the second Offer in Compromise.

The indictment that provides the basis for the trial of the defendant-appellant charges two separate, intentional acts, each of which could support a separate count of the indictment. Instead, however, the Justice Department elected to charge the defendant with two offenses constituting one criminal violation. The offense charging the improper transfer was not, as a matter of law, sufficiently proved by the prosecution. In Tri-Angle Club, Inc. v. U.S., 265 F. 2d 829, the Court, at page 833, stated:

The evidence viewed in a light most favorable to the Government is not sufficient to constitute substantial evidence of guilt beyond a reasonable doubt, and hence it was error for the Court to deny defendant's motion for acquittal interposed at the close of all the evidence.

See, also, Duff v. U.S., *supra*. In the Tri-Angle case, the Court was dealing with separate counts of an indictment. In the instant case, the Court, due to the failure of proof by the prosecution, should have dismissed that portion of the indictment charging the improper transfer, treating it in the nature of a separate count of the indictment. In light of the combined nature of the charges into a single count, it is not determinable, on this appeal, whether the jury convicted the defendant-appellant on the portion of the indictment charging understatement of income, the portion charging improper transfer of an asset or on both points.

The fact that the jury was requested to determine the issue of transfer which, as maintained above, was a question for the Court to determine, together with the serious problems of testimony relating to the other aspect of the indictment placed an undue burden upon the jury. The prejudice to the defendant-appellant is manifest. Had the Court properly stricken that portion of the indictment relating to improper transfer, there is a substantial possibility that the jury may have acquitted the defendant. This question, stemming directly from the error of the Trial Court in failing to dismiss that portion of the indictment charging the defendant with an improper transfer requires a reversal of the lower Court verdict and judgment thereon.

CONCLUSION

THE FAILURE OF PROOF OF THE PROSECUTION,
TOGETHER WITH THE ERROR OF THE LOWER
COURT IN FAILING TO GIVE PROPER APPLI-
CATION TO NEW YORK SUBSTANTIVE LAW AND
FAILING TO FIND AS A MATTER OF LAW THAT
THE PROSECUTION HAD NOT SUSTAINED ITS
BURDEN OF PROOF AS TO ONE-HALF OF THE
INDICTMENT REQUIRES A REVERSAL OF THE
JUDGMENT OF THE DISTRICT COURT.

Respectfully submitted,
PARISI, DE LORENZO, GORDON
& PASQUARIELLO, P.C.
THOMAS E. DE LORENZO, ESQ.,
Of Counsel.
Attorneys for Defendant
201 Nott Terrace
Schenectady, New York 12307

APPENDIX

of

DEFENDANT-APPELLANT

- I. Testimony of Martha Spoor - (R. 504-534)
- II. Motion of defendant-appellant following
the close of prosecution case - (R. 615-659)

1 MARTHA SPOOR,
2 having been called as a witness in behalf of
3 The United States of America, was first duly
4 sworn according to law and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. O'SULLIVAN:

7 Q. Mrs. Spoor, will you tell us your occupation or
8 profession?

9 A. I am a real estate broker.

10 THE COURT: Keep your voice up,

11 ma'am.

12 THE WITNESS: Pardon me?

13 THE COURT: Keep your voice up.

14 THE WITNESS: Okay.

15 BY MR. O'SULLIVAN:

16 Q. Are you self-employed?

17 A. I work for Prestige Realty and Baldwin Droms
18 Associates.

19 Q. You work for both Prestige Realty and Baldwin Droms
20 Associates?

21 A. Yes.

22 Q. And you do know the defendant, Warren Baldwin Droms?

23 A. Yes, I do.

24 Q. How long have you known him?

25 A. About 10 years.

1 Q. And when did you become a real estate broker?

2 A. I think it was probably 1969, maybe -- I think
3 it was around 1969

4 Q. And what was your employment before that time?

5 A. I was a saleslady.

6 Q. Was that also for Prestige Realty?

7 A. Yes.

8 Q. And before that?

9 A. I was a housewife.

10 Q. When did you begin to work for Prestige Realty at
11 the Capital District Corporation?

12 A. I think it was in 1967 when we first went into
13 Prestige Realty.

14 Q. Did you know who owned that company then?

15 A. Yes, it was Mr. Kolakowski.

16 Q. And you were an employee of the corporation then?

17 A. Yes, I believe so.

18 Q. How was your compensation paid when you worked for
19 Prestige Realty as a sales representative?

20 A. Commissions.

21 Q. Can you explain how that system would work on the sale
22 of a house? What would you get?

23 A. Well, if I sold a house and there was a commission
24 paid, and part of that is paid to the sales person.
25 If you list a house you also collect a listing

1 commission.

2 Q. What would this commission be?

3 A. You mean the amount?

4 Q. Yes.

5 A. Well, it is figured on a percentage basis.

6 Usually it is a six percent commission and the sales
7 person receives, usually, between the salesman and
8 the broker, probably about 50 percent.

9 Q. Then you would get three percent on the sale of a
10 house and the broker would get three percent?

11 A. Well, not exactly because that depends on whose
12 house it is and whose listing it is. It is a little
13 hard to define exactly as to that amount because the
14 listing broker collects 40 percent of the commission
15 and the selling broker collects 60, and the selling
16 salesman usually gets about 30 percent of this so --

17 Q. When you worked for Prestige Realty in 1967, what
18 commission did you get?

19 A. Well, as I explained, it depends on what the
20 property was on what I would get paid.

21 Q. Well, generally then.

22 A. You are talking about new houses?

23 Q. New houses.

24 A. All right. If it was a new house and the com-
25 mission was five percent and -- I think it was at that

1 time about 30 percent of that five percent.

2 Q. Would you get 30 percent of five percent?

3 A. Right

4 Q. Who would get the rest?

5 A. The broker probably.

6 Q. And who was the broker?

7 A. The broker was Prestige Realty. It went into our
8 office.

9 Q. The license for the broker was the Prestige Realty?

10 A. Well, Mr. Kolakowski was the broker at that time.

11 Q. So then the rest of that commission would go to the
12 corporation owned by Mr. Kolakowski?

13 A. Correct.

14 Q. Now, did there come a time when you acquired the
15 ownership of Prestige Realty of the Capital District
16 Corporation?

17 A. Yes.

18 Q. I show you Government's Exhibit 14 in evidence. Can
19 you tell me, have you ever seen this before?

20 A. Well, I saw it before.

21 Q. Well, can you identify what that is now?

22 A. Well, I think it is the stock. It is the shares
23 of stock for Prestige Realty.

24 Q. On page two, what would it reflect?

25 A. It says that I own the stock.

1 Q. Well, does it say where you got it?

2 A. From Warren Droms.

3 Q. And that is all of the stock of that corporation?

4 A. I believe so. It says 100.

5 Q. Do you still own this stock?

6 A. Yes.

7 THE COURT: Well, does that
8 certificate say how many shares?

9 THE WITNESS: It says 100 shares.

10 THE COURT: Does it say 100 on it?

11 THE WITNESS: I saw 100.

12 THE COURT: It is in evidence.

13 THE WITNESS: It says 100.

14 THE COURT: All right.

15 BY MR. O'SULLIVAN:

16 Q. Now, can you tell us what you paid to acquire this
17 100 percent ownership of Prestige Realty of the
18 Capital District Corporation?

19 A. Well, it wasn't -- you mean exactly in dollars
20 and cents?

21 Q. Yes.

22 A. I think it was about \$3500 which I had loaned to
23 Mr. Droms which he put into the business.

24 Q. The consideration you gave to Mr. Droms for the
25 transfer of this stock --

1 A. No, it wasn't for the transfer. Well, I suppose
2 it was indefinitely, but this money was paid before.
3 There was money which I had loaned to him before we --
4 before he even had the stock, when we first went into
5 Prestige Realty.

6 Q. Well, what I am trying to ask you is, what did you
7 give him in consideration for him giving you the full
8 ownership of this corporation?

9 A. Well, at the time when we went into Prestige
10 Realty, we were going into it, and Mike, Mr. Kola-
11 kowski, asked him if he would take over ownership.

12 Q. Can you tell us how much you paid him?

13 MR. DeLORENZO: Your Honor, can
14 we let the witness finish her testimony? I would
15 like to know what she has to say.

16 THE COURT: I agree. Let her
17 finish.

18 A. (Continuing) So he asked him if he would take
19 over the Prestige Realty, but he didn't have any
20 money and at that time I was just starting in as a
21 saleslady and it was an opportunity because it was
22 an opportunity to get onto the Board, the real
23 estate board which he was not a member of yet.
24 And so we thought it would be worth a try, but we
25 didn't have any money to go into the business with,

1 so with the commissions which I was receiving, part
2 of that, I would give back to him to put into the
3 business because at that time there was no money.

4 THE COURT: Give back to whom?
5 Wait a minute, wait a minute. Give back to whom?

6 THE WITNESS: To Mr. Droms.

7 THE COURT: Mr. Droms?

8 THE WITNESS: Yes.

9 THE COURT: Was he a salesman
10 with you at this time?

11 THE WITNESS: He was a broker and
12 he wanted to go into Prestige Realty as the manager
13 until Mike was paid enough money, Mr. Kolakowski was
14 paid enough money for him to take over the business.
15 This is an arrangement between Mr. Kolakowski and
16 Mr. Droms that he would manage the business until he
17 had enough money paid in, which was \$10,000, I believe.
18 At that time, then he would own the business. But
19 there was no money. Mr. Kolakowski, naturally, took
20 his money out of the corporation when Mr. Droms came
21 in as manager. So I think there were different times.
22 It wasn't any lump sum, but there were different times
23 when I would put money into it because I was going in
24 with him and I urged him to do this because it was a
25 chance for us to get started into a company, and I

1 didn't know the real estate business but I wanted to
2 learn it, and nothing ventured, nothing gained. I
3 felt that it was worth a chance. So we went into the
4 business and he was the manager. I was a saleslady.
5 And everything worked out fine. There were different
6 amounts, but I can't tell you exactly how much. There
7 were different times that I would put money into it
8 if it was needed because we had to keep -- to pay our
9 bills and pay the rent and the advertising and so forth
10 while we were just getting started, then after when
11 the business got going, this wasn't needed anymore.
12 But at the same time I was doing the selling and Mr.
13 Droms had an agreement with Mr. Kolakowski's son that
14 if we went into this, he was just starting in the
15 building business, that he would sell his houses.

16 MR. DeLORENZO: I'm sorry. Who
17 is "he" starting the building business?

18 THE WITNESS: This was Clifford
19 Kolakowski.

20 THE COURT: Do you want all this,
21 Mr. O'Sullivan?

22 THE WITNESS: Well, it is all
23 tied in.

24 THE COURT: You are here as a
25 witness, and I will decide. Do you want it all or not?

1 MR. O'SULLIVAN: Well, if you want
2 her to tell her story --

3 THE COURT: I want her to tell
4 part, but now she is going into some detail, so it
5 is up to you.

6 MR. O'SULLIVAN: I am really
7 trying to ascertain what she paid.

8 THE COURT: What was the date of
9 Exhibit 14, the stock transfer?

10 MR. O'SULLIVAN: November 2nd,
11 1968.

12 THE COURT: November 2nd, 1968,
13 all right. You can ask her specific questions. If
14 you want to, you can ask her. I don't know.

15 BY MR. O'SULLIVAN:

16 Q. Mrs. Spoor, did you keep a record of these con-
17 tributions you were making to Mr. Droms?

18 A. No, sir, I did not.

19 Q. You kept no record of it?

20 A. No. As I said, there was no large amount of money
21 at any one time. I think it might have been a couple
22 of hundred at one time or another until -- but in the
23 meantime I had started selling so I was making a very
24 good income after awhile and it was actually a good
25 investment for me, and if the business had flopped,

1 I wouldn't have been out anything because I was making
2 a good income anyhow while it was going, and it was a
3 chance to get started and to try it. And these were
4 all verbal agreements.

5 Q. Will you tell me what your source for these con-
6 tributions was?

7 A. As a saleslady, these were my commissions I
8 received.

9 Q. So you were paying your commissions into the
10 corporation?

11 A. If it was needed, yes, but as I say, they were at
12 different times. It wasn't any one big lump sum.

13 Q. All right. Now, would this be in the beginning of
14 this association?

15 A. Yes.

16 Q. Before the corporation started to make some money?

17 A. That's right. After we got selling a lot of
18 properties, then it was no longer necessary then.

19 Q. Well, as I understand what you are saying, the source
20 of your money is depending upon how much money the
21 corporation makes?

22 A. I beg your pardon?

23 Q. Your money is coming from the sale of each house?

24 A. Yes.

25 Q. And you are getting three percent of that?

1 A. Yes, roughly.

2 Q. And the corporation is getting three percent of that?

3 A. Roughly, yes.

4 Q. And these contributions you were making, these are
5 what, out of hand expenses, for example, for
6 advertising or something?

7 A. Oh, you mean what was the money needed for?

8 Q. Yes.

9 A. Well, we weren't selling that much right in the
10 beginning, and also I had sold some property with
11 my husband and I had a little money from that, and
12 when we first went into it, that was needed. We
13 didn't have any sales to start off with. The sales
14 that were on the books at the time belonged to Mr.
15 Kolakowski and he took them, the money from that.

16 Q. On the houses that he sold?

17 A. Yes.

18 Q. Well then, for what period of time were you putting
19 in these contributions, when did it start?

20 A. Probably just during the first year, I would say,
21 '67 and '68, I believe, only the first year.

22 Q. The first year?

23 A. After that we were -- we had gone along all right.

24 Q. And the total of this contribution was \$3500?

25 A. I think it was roughly about \$3500.

1 Q. Well, how much did you make in that year?

2 A. How much did I make? You mean for the year?

3 Q. Were these commissions from Prestige Realty your only
4 source of income in that year?

5 A. Yes.

6 Q. And how much did you make?

7 A. Which year are you talking about, '68?

8 Q. 1967.

9 A. 1967 I didn't make very much. I really don't know
10 how to answer that, I really don't know. It wasn't
11 very much.

12 Q. Were you married at that time?

13 A. Yes.

14 Q. And did your husband have an income?

15 A. Yes.

16 Q. Was he supporting you in the --

17 A. He was running the house at that time mostly.

18 Q. And he was providing an income for the support of the
19 family?

20 A. Yes.

21 Q. So your combined income was somewhat greater, is that
22 it?

23 A. I suppose, yes.

24 Q. Do you recall testifying before the Grand Jury in
25 Albany on April 16th and April 23rd, 1975?

1 A. Yes, I do.

2 Q. Do you recall being asked this question and giving
3 this answer?:

4 "Q. Your husband was employed at that time --"

5 THE COURT: Wait a minute now,
6 give the page.

7 MR. DeLORENZO: I object.

8 THE COURT: Give the page.

9 MR. O'SULLIVAN: This is page 47.

10 THE COURT: I assume Mr. DeLorenzo
11 has these minutes.

12 MR. DeLORENZO: Yes, sir, but I
13 would object to any cross-examination of his own
14 witness using any documents to impeach the witness
15 that he called to the stand.

16 THE COURT: What is your purpose
17 now, Mr. O'Sullivan?

18 MR. O'SULLIVAN: To impeach her
19 last statement. It is permissible under the new
20 Federal Rule 606, 607 of the new Federal Rule of
21 Evidence.

22 THE COURT: Federal Rules of
23 Evidence, okay. I will overrule the objection. So
24 make sure you call her attention to what you are
25 asking her, where she was at that time, what the

1 questions are, what the answers are.

2 BY MR. O'SULLIVAN:

3 Q. Well, do you recall testifying before the Federal
4 Grand Jury on April 16th, 1975?

5 A. Yes, I do.

6 Q. Here in this building?

7 A. Yes.

8 Q. In the Grand Jury room?

9 A. Right.

10 Q. Now, do you recall being asked this question and
11 giving this answer:

12 "Q. Your husband was employed at that time?

13 "A. I think we were separated at that time."

14 Do you recall that?

15 A. Yes, I do, but I don't think I was separated at
16 that time.

17 Q. Do you recall being asked this question and giving
18 this answer on page 48:

19 "Q. He was making alimony payments?

20 "A. No."

21 Do you recall that?

22 A. Yes, he never paid any alimony.

23 Q. Do you recall being asked this question and giving
24 this answer:

25 "Q. Support payments?

1 "A. No."?

2 A. Right.

3 Q. Do you recall being asked this question and giving
4 this answer:

5 "Q. Who was supporting the children?

6 "A. Me."

7 A. Right. Well, what year -- what is confusing me
8 is the years.

9 MR. DeLORENZO: This is his
10 witness. Could we let her answer the question?

11 THE COURT: I understand that.
12 What particular rule are you referring to, Mr.
13 O'Sullivan? 607 of what, the new rules?

14 MR. O'SULLIVAN: The new Federal
15 Rules of Evidence. "Credibility of a witness --"

16 THE COURT: I have the rule.
17 All right, that is the proper rule. I will overrule
18 the objection.

19 BY MR. O'SULLIVAN:

20 Q. And how many children did you have, Mrs. Spoor?

21 A. Three.

22 Q. Now, were you responsible for their support or was
23 your husband contributing?

24 A. Well, I am confused about the year. I think if
25 you are talking about 1967, I was not separated yet

1 at that time. I don't know what year you are
2 referring to at the Grand Jury.

3 THE COURT: When were you
4 separated, do you recall?

5 THE WITNESS: I believe it was in
6 '68, I believe.

7 THE COURT: All right.

8 BY MR. O'SULLIVAN:

9 Q. Well, these contributions you made to the corporation,
10 were you ever reimbursed for those contributions?

11 A. No. I didn't need to be reimbursed. I was making
12 a very good income after we got going on it, and then,
13 in fact, this was money which I had invested in the
14 hopes of making a good income.

15 Q. While you were putting the money into the corporation,
16 is that reflected on the corporate books as a loan to
17 the corporation?

18 A. I am not sure, but it probably would show as a
19 loan. Probably not from me. It would probably show
20 as a loan from Mr. Droms.

21 Q. Well, in the early part of the business -- well, the
22 source of the contributions is from your commissions,
23 is it not?

24 MR. DeLORENZO: I object. That
25 is not what the testimony was, Your Honor. This is

1 his witness and he is bound by her answer.

2 BY MR. O'SULLIVAN:

3 Q. What was the source of your contributions?

4 MR. DeLORENZO: May I have a
5 ruling on my objection?

6 THE COURT: Mr. DeLorenzo, you
7 should read Rule 607 of the new Federal Rules of
8 Evidence on what he is doing here, the new rule.

9 MR. DeLORENZO: She has testified
10 there were two sources where she got the money from.

11 THE COURT: I understand that,
12 but you are questioning his right to impeach this
13 witness and that rule is very specific.

14 MR. DeLORENZO: Not to impeach.
15 He is misquoting from the testimony.

16 THE COURT: Well, are you familiar
17 with the rule?

18 MR. DeLORENZO: Yes, but he is
19 misquoting from the testimony. She didn't say that
20 was the only source.

21 MR. O'SULLIVAN: I will ask the
22 question.

23 THE COURT: That is something we
24 can correct. Let her tell us again. Ask her again.

25 BY MR. O'SULLIVAN:

1 Q. What was the source of your contributions to the
2 corporation?

3 A. Like I said, it was probably mostly from
4 commissions, but they were at different times. I
5 can't tell you what the source was from each
6 individual time, I can't possibly remember.

7 Q. The source~~s~~ from your commissions from Prestige?

8 A. Mainly, yes, although, like I said --

9 Q. The contributions were made --

10 MR. DeLORENZO: Can the witness
11 finish her answer?

12 THE COURT: Mr. O'Sullivan, let
13 her answer.

14 A. (Continuing) As I say, there were other times
15 when I did have some money of my own which I put
16 into it.

17 THE COURT: How did you make these
18 payments?

19 THE WITNESS: How do you mean?

20 THE COURT: Well, in what form?
21 I mean, by turning over money or checks or what,
22 these contributions?

23 THE WITNESS: Probably just money.

24 THE COURT: Tell the jury, not me.
25 Money? That is, you would get the money and you would

1 transfer it to somebody?

2 THE WITNESS: That's right.

3 THE COURT: All right.

4 BY MR. O'SULLIVAN:

5 Q. In the early part of the business when you were
6 making these contributions, isn't it true that your
7 income was dependent upon the income of the corporation?

8 A. Well, the income of the corporation was dependent
9 on the sales, yes, and --

10 Q. If the corporation wasn't making any money, then you
11 weren't making any money?

12 A. Correct.

13 Q. So then how did you contribute this money to the
14 corporation?

15 A. Well, as I said, it depended on when it was,
16 depending on how much money I had, if I had money
17 available. It wasn't all just taking \$3500 and
18 handing it out. This was all in small amounts.

19 Q. And you kept no record?

20 A. No, sir, I didn't.

21 Q. And the total of this, the aggregate of all these
22 contributions would be how much?

23 A. I said I thought it was around \$3500. I believe
24 that is about approximately what it was.

25 Q. And Mr. Droms then transfers the stock to you on

1 November 2nd, 1968?

2 A. No, sir, that wasn't --

3 MR. DeLORENZO: Objection. He
4 is leading the witness, Your Honor.

5 THE COURT: No, overruled. Let
6 her answer. She says that is not true.

7 So what is the situation?

8 THE WITNESS: No, that was part
9 of it. The agreement was, it was a verbal agreement
10 we made at the same time that he made a verbal
11 agreement with Mr. Kolakowski to take over the
12 business, and we made a verbal agreement that if I
13 helped establish the business, get it going, acted
14 as the saleslady and we did get it going good, then
15 in turn for my efforts, that at that time, it wasn't
16 worth anything, but then the business would be mine.

17 BY MR. O'SULLIVAN:

18 Q. There was no written agreement--

19 A. There was no written agreement.

20 Q. -- your paying your income towards the corporation?

21 A. No, sir, it was all a series of verbal agreements
22 between Mr. Kolakowski and Mr. Droms, Mr. Droms and
23 myself and Mr. Droms and Mr. Clifford Kolakowski, and
24 everyone kept their word and the business did progress.

25 Q. Do you know when the \$10,000 was paid?

1 A. Well, I didn't know at the time that I was at the
2 Grand Jury, but now I understand it was the first --
3 somewhere around the first half of '68.

4 Q. Would it be May of '68?

5 A. I couldn't tell you the exact month, I don't know.

6 Q. Do you know when the corporation transferred, or the
7 stock certificates were transferred from Mr. Kolakow-
8 ski to Mr. Droms?

9 A. I didn't know it at the time I went to the Grand
10 Jury, but now I understand it was in November of '68.

11 Q. Now, do you know the reason why the stock wasn't
12 transferred in May of '68?

13 A. No, I have no idea why. It was no rush on it,
14 I mean, no one was pushing each other on any of these
15 agreements. Everyone's word was good and everyone
16 did what they said they would do, but there was no
17 problem about anyone worrying about the other person
18 not keeping their word.

19 Q. You were in this agreement with Mr. Droms to pay Mr.
20 Kolakowski \$10,000?

21 A. No, sir, I was not in that agreement. That was
22 between Mr. Droms and Mr. Kolakowski.

23 Q. What is the agreement you were in?

24 A. Just with Mr. Droms and myself.

25 Q. What was that agreement?

1 A. Well, that is what we were just talking about,
2 about helping him to start the business, keep it
3 going. It had been started, but to keep it going.

4 Q. Well, then you were not buying the corporation from
5 Mr. Kolakowski?

6 A. I was not, no.

7 Q. Mr. Kolakowski was the broker for the corporation?

8 A. Yes.

9 Q. Is that because Mr. Droms was not on the realty
10 board, is that what you said?

11 A. Mr. Kolakowski was the broker because he owned
12 the corporation and he was on the board at that time,
13 yes, and Mr. Droms was not. At that time you had to
14 apply to get on the board and there was a waiting
15 time, and then you had to be accepted, and this took
16 a long time.

17 Q. What was the purpose of being on the realty board?

18 A. Well, because if you were on the board, then you
19 could use the multiple listing service and sell other
20 agency's properties. If you weren't on the board,
21 you were very restricted because they wouldn't let
22 you show any of the other property.

23 Q. Well, was the corporation on the realty board?

24 A. Well, I am not sure about that. I think it is
25 just brokers, but brokers have to have their own

1 agency. I am not sure. I don't think the corporation
2 itself --

3 Q. Was it necessary for you and Mr. Droms to have Mr.
4 Kolakowski because he was on the board?

5 A. It was very helpful to us, yes.

6 Q. Well, the stock then is transferred to you from Mr.
7 Droms on November 2nd?

8 MR. DeLORENZO: Objection. That
9 is repetitious, Your Honor.

10 THE COURT: Sustained. We have
11 been over that. We know that.

12 BY MR. O'SULLIVAN:

13 Q. Now, after you assumed ownership of the corporation,
14 did you look at the corporate books to determine its
15 value or --

16 A. No.

17 MR. DeLORENZO: Objection. Your
18 Honor, what she did after ownership has no bearing
19 on the issues in this law suit.

20 THE COURT: Overruled.

21 A. No.

22 THE COURT: What did you do after
23 you got the stock certificate?

24 THE WITNESS: (Well, actually, I
25 didn't even know I had it when I had it, it seems.

1 I wasn't even aware that the transfer had taken
2 place for quite some time because I was busy with
3 the selling and it didn't make any really big
4 difference in what I was doing. I was very happy
5 working under -- it didn't actually matter to me
6 whether Mr. Kolakowski owned the stock or Mr. Droma
7 owned the stock or I owned the stock. I was doing
8 the same job, being paid the same amount of money.)

9 THE COURT: Well, did you have
10 possession of that stock certificate?

11 THE WITNESS: No, sir, I never
12 saw it.

13 THE COURT: You never saw it?

14 THE WITNESS: I don't believe,
15 I don't recall seeing it.)

16 BY MR. O'SULLIVAN:

17 Q. But it made no difference in your income?

18 A. No.

19 MR. O'SULLIVAN: I have no further
20 questions.

21 CROSS-EXAMINATION

22 BY MR. DeLORENZO:

23 Q. Mrs. Spoor, then the stock certificate was not
24 delivered to you then, is that what you are saying?

25 A. That's correct.)

1 Q. Mrs. Spoor, back in 1968, the early part of '68, who
2 would sign any of the legal papers for the corporation,
3 Prestige Realty of Schenectady?

4 A. That would be Mr. Kolakowski.

5 Q. Was Mr. Kolakowski's office in the same building as
6 the real estate office?

7 A. Oh, yes, it was right in the corner of our office.

8 Q. He testified here in front of the jury that he owned
9 the building on State Street, the address slips me.

10 A. That's right, he did.

11 Q. Do you know the address offhand?

12 A. 1011 State Street.

13 Q. And Mr. Kolakowski himself owned the building?

14 A. Yes.

15 Q. And in that building we have a real estate office
16 known as Prestige?

17 A. Right.

18 Q. He testified that Prestige was paying him rent, is that
19 a fact?

20 A. That's right.

21 Q. Did you have separate quarters for Prestige Realty in
22 this building or was Mr. Kolakowski right in there?
23 Could you somehow describe it for the jury?

24 A. Well, we had the --there were offices made in the
25 basement of the building and we had one large room

1 and then at each end there was a smaller office, and
2 Mr. Kolakowski occupied one of the smaller offices.

3 Q. Up until November 1st, 1968, who would receive the
4 mail addressed to Prestige Realty of Schenectady,
5 Incorporated?

6 A. Mr. Kolakowski.

7 Q. Was it given to him by any particular person?

8 A. Well, I believe the mailman brought the mail in
9 and left it upstairs on the first floor at the
10 insurance office, and she brought it downstairs and
11 gave it to Mr. Kolakowski and he gave us ours.

12 Q. Well, did he open it before he gave it to you?

13 A. At times, yes.

14 Q. Mrs. Spoor, you testified that you said the source of
15 the money that you loaned to Warren to keep the
16 business going was mainly from commissions, and you
17 said there was another source, I believe you testified
18 about the sale of a house?

19 A. Yes, that's true.

20 Q. And did you derive a benefit from that sale, is that
21 it?

22 A. Yes, a couple of thousand dollars.

23 Q. So you had some added funds to work with?

24 A. That's right.

25 Q. And did you use some of those funds toward the

1 purchase or towards the assistance of this corporation?

2 A. Yes, I did.

3 Q. Your agreement though with Mr. Droms was oral, is
4 that right?

5 A. That's true.

6 Q. So that the stock that was turned over to you that
7 was introduced here that you say you never received,
8 there was no agreement to turn that over to you
9 which was in writing?

10 A. That's true, there was nothing written.

11 Q. Do you know if there was any written agreement
12 executed by Kolakowski and Droms prior to November
13 1st, '68 for the so-called sale of the corporation,
14 which I am at a loss to really understand, but --

15 A. I don't believe so.

16 Q. Did you ever see any agreement?

17 A. No.

18 Q. You mentioned that Mr. Kolakowski had some sales that
19 ran through the corporation that you received or the
20 corporation received no benefit. Was that at the
21 beginning of the period of time we were discussing?

22 A. Yes, those were sales which were on the books at
23 the time.

24 Q. So that the Prestige Realty, when you and Warren
25 assumed management and so forth, did not receive any

1 benefits from it?

2 A. Oh, no, no.

3 Q. The benefits you received from the work that you
4 actually did yourself by going out and selling homes
5 and listing homes?

6 A. That's true.

7 Q. Who did the actual selling and listing of homes, you
8 or Mr. Droms?

9 A. Oh, he didn't do any selling; I did it.

10 Q. What was his physical condition at the time?

11 A. Well, his physical condition wasn't too good and
12 it hasn't been too good up until the present time.

13 Q. Do you know if he was under a doctor's care back in
14 '67, '68?

15 MR. O'SULLIVAN: Your Honor, I
16 object. I don't know what the relevancy of his
17 physical condition at that time is.

18 THE COURT: Sustained.

19 MR. DeLORENZO: I didn't even
20 hear his objection, Your Honor.

21 MR. O'SULLIVAN: As to relevancy.

22 THE COURT: Relevancy as far as
23 relating to direct examination.

24 MR. DeLORENZO: He has made a big
25 point of --

1 THE COURT: You can bring her
2 back as your witness if you want to get into the
3 physical condition of Mr. Droms.

4 MR. DeLORENZO: Well, I was.

5 THE COURT: But not on this cross-
6 examination.

7 BY MR. DeLORENZO:

8 Q. You said that you were the one that would actually
9 sell the property and list the property in '67 and '68?

10 A. That's true.

11 Q. Do you know who the accountant was for the Prestige
12 firm prior to Warren Droms becoming manager of that
13 firm?

14 A. It was Mr. DiSorbo.

15 Q. And did Mr. DiSorbo continue on as the accountant
16 when Warren and you ran the business known as Prestige
17 Realty?

18 A. Yes, he did.

19 Q. Are you familiar with Mr. DiSorbo's signature, were
20 you?

21 A. No, I don't believe so.

22 Q. I show you Defendant's Exhibit E which is in evidence,
23 and I ask you to look at it and see if you know all
24 the signatures that appear on there. There are three
25 here and one on the bottom, or two on the bottom.

1 A. I don't know the Notary Public's signature.

2 Q. How about the signature above the word "Anthony
3 DiSorbo", are you familiar with that signature?

4 A. No, sir, I am not.

5 MR. DeLORENZO: I have no other
6 questions, Your Honor.

7 THE COURT: Is that all, Mr.
8 O'Sullivan?

9 REDIRECT EXAMINATION

10 BY MR. O'SULLIVAN:

11 Q. Mrs. Spoor, were you the only sales representative
12 Prestige Realty had in 1967 and '68?

13 A. No, I wasn't, but at that time we were just
14 getting started with --

15 Q. How many others were there?

16 A. I think --

17 Q. Your best recollection.

18 MR. DeLORENZO: Can we pinpoint
19 the time, Your Honor? He has given two years. I
20 think that is --

21 MR. O'SULLIVAN: '67 and '68.

22 MR. DeLORENZO: May I continue
23 with my objection?

24 THE COURT: You are both talking
25 at the same time. The reporter can't get it and I

1 can't understand you when you speak at the same time
2 I will ask her.

3 How many sales representatives were there in
4 1967 other than yourself?

5 THE WITNESS: I believe probably
6 about five.

7 THE COURT: Five. And in 1968,
8 how many, if you recall?

9 THE WITNESS: I'm not exactly
10 sure about that, but probably about the same. There
11 was about the same amount, I believe, until I opened
12 the Ballston Spa office, which I did, and then I hired
13 more sales people up there, and this was, as I said,
14 this was starting -- at the time when we were starting--

15 THE COURT: We don't care about
16 any details. We just want to know one thing. How
17 many sales representatives, if you know, that you
18 had in 1967 and 1968?

19 THE WITNESS: Well, I told you
20 that.

21 THE COURT: Five, is that about
22 right?

23 THE WITNESS: Yes, I think.

24 THE COURT: All right.

25 MR. O'SULLIVAN: Thank you,

1 Mrs. Spoor.

2 THE WITNESS: But we didn't all
3 sell the same property.

4 THE COURT: Never mind. If we
5 want any more answers, the lawyers will have to ask
6 you questions.

7 Do you have any other questions for the lady,
8 Mr. O'Sullivan?

9 MR. O'SULLIVAN: No, Your Honor.

10 THE COURT: Mr. DeLorenzo?

11 MR. DeLORENZO: I have nothing.

12 THE COURT: All right, thank you.

13 You are excused.

14 (Witness excused).
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1 THE COURT: All right, thank you.

2 (Witness excused.)

3 MR. O'SULLIVAN: Your Honor, the
4 Government rests.

5 THE COURT: All right, ladies and
6 gentlemen, I will have to excuse you now from the
7 courtroom. We are at the end of the prosecution's
8 proof.

9 Under our rules we take motions now,
10 so I will excuse you from the courtroom until you
11 are asked to return.

12 (Jury leaves courtroom.)

13 THE COURT: All right, Mr. DeLorenzo.

14 MR. DeLORENZO: May it please the
15 Court, your Honor, the indictment which is in front
16 of you states one count, but it has two specific
17 subdivisions, shall we say, and the first motion I
18 am making is to the subdivision concerning the
19 disposing of assets at a cost in excess of \$500
20 or for less than full value of such asset.

21 I think we had better get the question.
22 There was some confusion the way the indictment reads,
23 but they are saying, in effect, in the indictment
24 that we, that is, my client, disposed of an asset
25 or property with a cost or fair market value at the

1 time of sale, transfer, exchange, gift or other
2 disposition in excess of \$500, except for full value
3 from the beginning of the taxable period covering
4 this offer and compromise to the present date.

5 THE COURT: What is the number of that
6 question?

7 MR. DeLORENZO: 23, your Honor. I
8 am addressing my motion now specifically to that
9 charge.

10 Number one, there has been no proof
11 that on the alleged date when the transfer took place
12 of this stock certificate, which is November 2nd,
13 1968, November 2nd is when the United States Attorney
14 stated that the transfer took place and he introduced
15 into evidence the stock certificate showing that
16 W. Baldwin Droms transferred his hundred shares of
17 this corporation in question to a Martha B. Spoor
18 back on November 2nd, '68.

19 There is no proof in this record as
20 to the value of that stock on that date. And in
21 view of that, I would move to dismiss that part of
22 the indictment because there is no proof as to value
23 on that date. I so move.

24 THE COURT: All right, Mr. O'Sullivan,
25 what is your position?

1 MR. O'SULLIVAN: You have an answer
2 to that that would reflect the income tax return
3 and the physical calendar year, '68. Two days
4 before the transfer at the bank account, a loan
5 of this corporation got \$23,000 plus in it, and
6 the testimony of Mrs. Spoor is that she paid \$3500
7 at best.

8 MR. DeLORENZO: It doesn't mean --

9 MR. O'SULLIVAN: That's a transfer
10 for less than full value.

11 MR. DeLORENZO: Does that mean it was
12 worth that much on November 2nd, 1968?

13 I say there is no proof. And in a
14 criminal case, he has got the burden of proving
15 it, not I.

16 But I am going to add something to
17 this motion that I think will convince your Honor.

18 A reading of all the testimony will
19 show you that they only produced a stock certificate
20 which Mr. Broadbent testified that he picked up a
21 copy from Frank Parisi, my partner. That is agreed,
22 stipulated, right, Mr. O'Sullivan?

23 MR. O'SULLIVAN: I don't know that
24 you stipulated to it.

25 MR. DeLORENZO: Well, it is in evidence.

1 MR. O'SULLIVAN: That's true.

2 MR. DeLORENZO: Now, under the law,
3 it is their obligation, the People's obligation to
4 prove that we transferred this stock certificate
5 back on November 2nd, '68. What does the Uniform
6 Commercial Code say? We are sitting in the State
7 of New York, therefore, the Uniform Commercial Code
8 applies, and I refer you to Section 8, Subdivision 309.
9 It says, "Effect of endorsement without delivery:
10 an endorsement of a security, whether special or
11 in blank, does not constitute a transfer until
12 delivery of the security on which it appears or if
13 the endorsement is on a separate document until
14 delivery of both the document and the security.
15 Effective 1964."

16 Cases under it: Federal Court Case
17 Inre Broomhill, District Court SD, New York, November 6,
18 1930, Judge Cox: mere placing of stock in new names
19 of purchaser without transfer of physical possession
20 of certificate was not transfer within meaning of
21 section.

22 What testimony did they prove or did
23 induce or did they introduce showing a transfer of
24 the stock certificate? None, not one.

25 Martha Spoor, under oath, under direct

1 examination by the United States Attorney said,
2 "I never saw it, I never received the stock certifi-
3 cate."

4 Where is the proof of delivery?
5 I say the record is naked of that, and that must fall.
6 The motion to dismiss must be granted on that respect
7 because there is no proof of delivery.

8 In addition, there is no proof of
9 value, and definitely no proof of delivery as
10 required by our New York Commercial Code.

11 THE COURT: Is that the only case?
12 That is a long time ago.

13 MR. DeLORENZO: No, there are more,
14 your Honor. I will give you --

15 THE COURT: No, I don't want it.
16 You tell me.

17 MR. DeLORENZO: You want it all, all
18 right.

19 THE COURT: There is a supplement there.

20 MR. DeLORENZO: I just won a case on
21 an 1894 case, so it doesn't necessarily mean the
22 newness of the decision. It is still good law.

23 THE COURT: Well, I don't know whether
24 you will find another case, but you had a 1930.
25 Outside of that, Mr. O'Sullivan, have you proven

1 delivery here?

2 MR. O'SULLIVAN: As I understand
3 counsel's argument, he is saying that the asset
4 was never disposed of, in which case the defendant
5 still possessed it, and if that be the case, then
6 he has lied on Item 26 of this document.

7 MR. DeLORENZO: The statute of
8 limitations, your Honor, more than six years expired.

9 MR. O'SULLIVAN: The statute of
10 limitations has got nothing to do with it. This is
11 filed timely.

12 THE COURT: Wait a minute, don't talk
13 at once. I want to ask you what proof do you have
14 that this stock certificate went into the hands of
15 this lady on November 2nd, 1968 or whatever the year
16 was.

17 MR. O'SULLIVAN: Well, she says she
18 bought it, she owned it.

19 THE COURT: Well, you tell me what
20 you have.

21 MR. O'SULLIVAN: And the certificate
22 was transferred to her.

23 MR. DeLORENZO: That's not the statement.

24 MR. O'SULLIVAN: The certificate
25 showed the transfer took place on November 2nd, 1968.

1 MR. DeLORENZO: There is no proof
2 of delivery.

3 MR. O'SULLIVAN: That was attained
4 from the corporation's representative as what the
5 corporate books reflect.

6 MR. DeLORENZO: Does that mean there
7 is delivery, your Honor, of the stock certificate?
8 It is incumbent of him to prove every allegation.

9 THE COURT: I know that. So can you
10 show any part of delivery? That is what I want to
11 know. Did she say, I have got it, I have not got it?
12 Did she say she never saw the stock certificate before?

13 MR. DeLORENZO: May I suggest, we
14 have her entire testimony on this --

15 THE COURT: Will you please let me
16 talk to Mr. O'Sullivan, then you will have your turn.

17 All right, you tell me what you have.

18 MR. O'SULLIVAN: Well, as I recall it,
19 she said that she didn't see the certificate on the
20 date it was supposed to be transferred, but she had
21 seen it sometime later.

22 THE COURT: Where did you obtain the
23 certificate?

24 MR. O'SULLIVAN: From Mr. Parisi, who
25 was then representing the corporation pursuant to the

1 IRS summons. They asked to see those stock
2 certificates and he gave him those copies. It is
3 saying that is what the corporate records reflect.
4 If that is what the corporation says --

5 THE COURT: All right. Do you have
6 the supplement? Do you have a more recent case?

7 MR. DeLORENZO: Yes, I was just
8 reading this one case, Judge. In re Roszkowski Estate,
9 45 Misc. 2nd, delivery of a stock certificate
10 endorsement is effectual to transfer title, delivery.

11 Another one, where stock certificate
12 and executed stock power were delivered to daughter
13 by decedent shortly before her death for purpose
14 of having stock transferred into their joint names
15 with right of survivorship. Delivery is the key
16 in this Koszkowski Estate. This is a leading case
17 since then, delivery.

18 Decedent's possession of stock
19 certificates is evidence of delivery, and again,
20 you have got to have that delivery all the way
21 through these cases.

22 THE COURT: All right, what is your
23 position, Mr. O'Sullivan?

24 MR. O'SULLIVAN: Well, my position
25 is this --

1 THE COURT: Did you realize that
2 you might have this question confront you?

3 MR. O'SULLIVAN: I never heard of
4 this before. But as I understand the law, the
5 possession of the stock certificate doesn't
6 reflect ownership. It is the corporation records
7 which reflect the ownership of that certificate.

8 MR. DeLORENZO: And the corporation
9 records aren't in evidence.

10 MR. O'SULLIVAN: The corporations,
11 we got from the --

12 MR. DeLORENZO: Where are they?

13 MR. O'SULLIVAN: Your partner gave us --

14 THE COURT: Don't argue with each other.
15 You are both grown men. Let me listen to him.
16 Go ahead.

17 MR. O'SULLIVAN: The corporation
18 records we have are the records given to us by the
19 corporate representative, Mr. Parisi.

20 THE COURT: Do you have a record that
21 the books shows transfer? That is the point.

22 MR. O'SULLIVAN: This is the only
23 record they gave us.

24 THE COURT: Is there any record?

25 MR. O'SULLIVAN: This is a stock record

1 of the corporation.

2 MR. DeLORENZO: You have got to prove
3 your case. I don't have to prove your case.

4 MR. O'SULLIVAN: Pursuant to that
5 summons, that was what was produced.

6 MR. DeLORENZO: There is no delivery.
7 That wasn't found in Mrs. Spoor's possession.

8 THE COURT: Don't argue witheach
9 other. You are supposed to address your motions to
10 me, not him.

11 MR. DeLORENZO: I renew our motion.

12 THE COURT: I never such action like
13 this, honestly. Is that the way they practice in
14 Schenectady?

15 MR. DeLORENZO: Maybe it's the Italian
16 blood in me, your Honor.

17 But, in conclusion, I state that
18 there is no delivery proof.

19 THE COURT: I understand your point,
20 so if you will allow it, I will reserve on that
21 particular question.

22 It has just confronted me now and
23 I don't know enough about the statute that you are
24 talking about. I haven't had it, of course, but
25 off the cuff, I can't recall. If you will permit it.

1 I will reserve on it. If you don't, I will have to
2 rule.

3 MR. DeLORENZO: Did I give you the
4 citation, Judge, on that, on the leading case?

5 THE COURT: I know you have got the
6 Code there. What is the number?

7 MR. DeLORENZO: The Code is 8-309,
8 Uniform Commercial Code.

9 THE COURT: I have it.

10 MR. DeLORENZO: And the leading case
11 is 47 New York, Fed. 2nd, 948.

12 THE COURT: What is the number of it?

13 MR. DeLORENZO: 47 New York, Fed. 2nd.

14 THE COURT: That is the Southern District?

15 MR. DeLORENZO: 948.

16 THE COURT: Okay, Mr. O'Sullivan,
17 you better get the books out and look at that. I
18 will reserve on that particular motion.

19 MR. O'SULLIVAN: The Government will
20 be given an opportunity to respond to this motion,
21 is that correct?

22 THE COURT: That's right.

23 MR. DeLORENZO: I assume that we
24 will have a ruling by tomorrow morning before the
25 case goes to the jury?

1 THE COURT: Oh, definitely, I hope so.

2 MR. DeLORENZO: Also, your Honor, at
3 this time I would like to move to dismiss the entire
4 indictment on the ground of confusion. The People's
5 own case showed that the accountant that is involved
6 in preparing some of these documents that are in
7 evidence, some of the crucial documents, has made
8 several gross errors. Not only did he mistreat the
9 sale of the stock, the question about the sale of
10 the stock, he had one fellow paying tax on ordinary
11 income when it should have been a capital gain.
12 Now he finds out that he made a 5200-dollar mistake
13 in favor of the taxpayer. This is their witness,
14 they have to live with him. Where is there any
15 evidence of willfulness when you keep in mind that
16 you have two financial statements. The first one
17 is not the basis of the indictment, that is the
18 one in the summer of '68.

19 THE COURT: I remember that.

20 MR. DeLORENZO: The one in question
21 is April of '69. Cliff Atkinson and everyone else
22 who examined those admitted that they are identical,
23 identical except for what, one showed income of
24 '65 and '67 and the other one showed '67, '68.
25 Their other witness, Ertell, in cross-examination,

1 admitted that the only reason why he submitted a
2 new one was to what, the Government wanted it,
3 and that is his own words, the Government wanted
4 to update the income because '66 income, there
5 wasn't any, so they said they wanted to update it,
6 give us '67, '68.

7 Mr. Ertell passed the buck to
8 Mr. Dennis who testified here, and he claims he
9 had his secretary have Mr. Droms sign it. There
10 was no proof of a real interview. He had this
11 man come in and sign it, he said his girl had him
12 sign it.

13 I say, as a matter of law, what
14 happened is that he took the first one and copied
15 it into the second one because he didn't reduce
16 the mortgage payments, he didn't change the
17 answers, he changed nothing. They even made
18 mistakes. The record is full of mistakes.

19 He admitted himself, on \$25,000
20 he put it in the wrong column, they call income.
21 They had a W-2 in their possession, yet they
22 called the commission. It is obviously a real
23 state of confusion, such a state that this case
24 should not go to the jury, that I think your Honor
25 can see plenty that there is no case at all made

1 out as far as proving the defendant, Baldwin Droms,
2 guilty beyond any reasonable doubt. I say this
3 man is innocent and it is obvious from the record
4 that he is innocent.

5 THE COURT: All right, Mr. O'Sullivan,
6 did you make a case? Of course, at this stage, we
7 have the Taylor Case which is controlling and the
8 standards I have to use in ruling, and the Taylor
9 Case arose in this courtroom.

10 It went to the Court of Appeals,
11 Second Circuit.

12 MR. O'SULLIVAN: Mr. Dennis' testimony
13 was that he prepared the rough draft of the sub-
14 stantive issues on this document, and that first
15 page, I don't know whether anything would have
16 changed, but the first page has nothing material on
17 it. I assume Mr. Dennis was referring to the income
18 data and financial data. That is what he prepared.
19 And I don't know that any of these things would
20 have changed his testimony. Mr. Droms told him
21 that he had not reduced his interest or principal
22 on his home mortgage. Therefore, that wouldn't
23 have changed, and I don't know that any of these
24 other items would have changed. And he indicates
25 that the interest reported on the last page of the

1 form is not the interest for Mr. Droms' home mortgage
2 but the interest for these other liabilities that
3 he had. He has got a loan on insurances, got a
4 2,000-dollar note, he has got accrued taxes that he
5 is also paying interest on.

6 I know for a fact that the \$740 is
7 not the interest on his home because the bank
8 reports that the interest for 1967 on his home
9 or 1968 on his home was over \$1200, so that is not
10 the interest he is reporting on this form.

11 He is reporting \$740 interest which
12 Mr. Dennis said was pertaining to the other
13 liabilities.

14 THE COURT: But you are not alleging
15 all the other items on this, you are alleging
16 two things, the income understated and the transfer
17 of assets, isn't that your case?

18 MR. O'SULLIVAN: Well, I am responding
19 to his charge that Mr. Dennis is copying one from
20 from the other.

21 THE COURT: But, I mean, isn't that
22 your --

23 MR. O'SULLIVAN: Yes, that is my case.

24 THE COURT: It is related to two items,
25 what are the numbers, 23 and 26?

1 MR. O'SULLIVAN: No, the understatement
2 of income which would be reflected --

3 THE COURT: In Government Exhibit 3?

4 MR. O'SULLIVAN: Government Exhibit 3.
5 It is reflected in two spots.

6 MR. DeLORENZO: 22.

7 MR. O'SULLIVAN: It is reflected
8 under Item 22 and it is reflected under 21, under
9 Items 21 and 22.

10 THE COURT: And the transfer of the
11 asset in the wording of the question is what item?

12 MR. O'SULLIVAN: Item 23.

13 Do you want the wording?

14 THE COURT: No. That is what your
15 indictment is directed at?

16 MR. O'SULLIVAN: Yes.

17 THE COURT: There was a statement
18 made in those regards that they were not true and
19 correct?

20 MR. O'SULLIVAN: Yes.

21 THE COURT: To the knowledge of this
22 defendant?

23 MR. O'SULLIVAN: Testimony is that
24 Mr. Droms went to Mr. Dennis -- I'm referring now
25 to the income understatement. He goes to Mr. Dennis

1 and he gives him a W-2 and says, that is all the
2 income I have. This is in March of '67. And
3 Mr. Dennis is preparing this form, this draft of
4 this form.

5 Now, he knows that he has got more
6 income than what is reported on that W-2 because
7 he is paying his home mortgage, he is paying his
8 real estate taxes, he knows none of that is going
9 to be reflected on a W-2. He knows what his W-2
10 is, that is why he got into this problem because
11 he didn't pay over the payroll withholding tax.

12 THE COURT: So your argument is that
13 they did converse about it, Dennis and Droms,
14 according to the testimony of Dennis?

15 MR. O'SULLIVAN: Of course, that is
16 what Mr. Dennis says.

17 THE COURT: No, I think there is
18 enough at this stage to deny the motion except on
19 the transfer and delivery proposition involved
20 with the stock and that I want to reserve on, if
21 you will consent to it.

22 MR. DeLORENZO: Yes, I have no
23 objection.

24 THE COURT: I think there is enough
25 here at this stage to overcome your motion with

1 respect to the other aspects which you have based it
2 on.

3 Are you ready to proceed?

4 MR. DeLORENZO: Yes.

5 MR. O'SULLIVAN: May the lawyers
6 take a little break?

7 THE COURT: Are you that tired already?
8 We just started. Wait until you have a ten-week trial.

9 All right, we will take ten minutes.

10 (Necess taken.)

11 (Trial resumes.)

12 MR. DeLORENZO: Your Honor, on this
13 point, the more I think about that motion that I made,
14 I would like to -- I'm going to be putting my man
15 on the stand. I think soon we may get into the
16 question of this. I would like a decision now, if
17 I can, your Honor, or soon, on this transcript
18 before we go ahead with our proof.

19 THE COURT: All right, I'll just take
20 a look at it in my office and see.

21 MR. DeLORENZO: No hurry. Just take
22 a break and look it over.

23 THE COURT: I will do the best I can.

24 MR. DeLORENZO: Thank you, your Honor.
25 You can see my point. I think we ought to resolve

1 that before.

2 THE COURT: It is up to you, if you
3 don't want to allow me to reserve, it is your
4 privilege.

5 MR. DeLORENZO: I would like a ruling
6 now, if I could, your Honor, on this.

7 THE COURT: Usually the judges
8 accommodate for that, so I will go in and look at
9 your statute and case law.

10 MR. DeLORENZO: All right, thank you,
11 your Honor.

12 (Recess was taken.)

13 (Trial resumes.)

14 THE COURT: Well, ladies and gentlemen,
15 we had some complications in this case, and it is
16 plainly a legal problem. But I also had to take
17 up another matter because there are always other
18 matters that are waiting for me to listen to and
19 decide when I can.

20 But the lawyers have decided, and I
21 have myself, that at this particular time it would
22 be advisable to wait until tomorrow to continue the
23 trial. There is research due on a certain problem.
24 The lawyers are going to work at it and I will work
25 at it myself.

1 So I ask you again to be particularly
2 careful. We are getting near the end of this case.
3 Don't talk to anyone about it. Please wait until
4 you hear all the evidence. Your presence here is
5 very important. The Court appreciates it and the
6 attorneys do, and I can promise you that you are
7 fulfilling a very important civic responsibility
8 so I would ask you to come back tomorrow morning
9 at 9:30. The lawyers and I are going to meet at
10 9 o'clock. Thank you very much. 9:30.

11 (Jury leaves courtroom.)

12 THE COURT: All right, Mr. O'Sullivan,
13 I assume now you have had some opportunity, not too
14 much, to check out the statute?

15 MR. O'SULLIVAN: Well, I have seen
16 the statute. I don't know whether it is contradicted
17 by some other statute or by some Federal law. I
18 haven't had time to research it.

19 THE COURT: Do you want more time
20 to research it or do you think you have a problem
21 here? Because you heard the point he makes, and
22 there is this statute, and I think it has to be
23 read in conjunction with 8313 of this
24 Uniform Commercial Code which defines different
25 circumstances under which a delivery can take place.

1 Did you see that?

2 MR. O'SULLIVAN: No.

3 THE COURT: Possession can be one
4 of those particulars that they designate in 8313.
5 The other case is Wolder against Cir, a more recent
6 case, 493 F 2nd, 608, 612, 613, Second Circuit 1969.
7 They talk about this 309 statute.

8 MR. DeLORENZO: Judge, in regards to
9 -- I'm sorry.

10 THE COURT: The point is, you have
11 to persuade me what you have in this record that
12 might show possession, because one of the first
13 things of 8313 is possession. Sometimes that can
14 be inferred as well as proved directly.

15 MR. DeLORENZO: My recollection of the
16 testimony is that she was never given that.

17 THE COURT: So what you are suggesting --

18 MR. O'SULLIVAN: I would like some time
19 to research it.

20 THE COURT: And you don't want to
21 go forward without a ruling on that particular part?

22 MR. DeLORENZO: Well, as --

23 MR. O'SULLIVAN: As I understand it,
24 there is just one witness or two witnesses.

25 MR. DeLORENZO: One witness, I'm going

1 to limit it to one witness.

2 MR. O'SULLIVAN: Well, if I could
3 have overnight to research it, in the morning we
4 could take care of that and he could proceed with
5 his case and we could probably get through
6 summations and charge all tomorrow.

7 MR. DeLORENZO: Maybe, your Honor,
8 if I could talk with my client for a few minutes,
9 possibly we can go ahead. I don't know. My first
10 indication was to get a ruling on this before we
11 went into -- before I let the defendant take the
12 stand.

13 MR. O'SULLIVAN: I think if he takes
14 the stand, the Government would be obligated to
15 pursue that part of the indictment, and then later
16 on it may be held out of the indictment and may be
17 prejudicial to the defendant for that kind of
18 testimony to go to the jury.

19 THE COURT: Maybe. But I think the
20 safer course might be to hold off and give him an
21 opportunity. The things I have in mind, look at
22 those two statutes and does it apply to this
23 Federal case. They are all written in different
24 situations than we have here, of course, but you
25 charge him with transfer of an asset. The transfer

1 was controlled by this Uniform Commercial Code.
2 Does entail some delivery, but you have to read
3 other parts of the Code, and your part is to show
4 what you have here by inference. I don't know,
5 I don't recall all her testimony.

6 MR. DeLORENZO: Well, I'm going to
7 object to inference, your Honor. We are here on
8 a criminal case. This man is standing trial on
9 a criminal charge. It has got to be direct on
10 showing transfer.

11 THE COURT: You can have inferences
12 in criminal cases the same as you can any other case.
13 The jury can draw any inference they want.

14 MR. DeLORENZO: Yes, but so far,
15 there isn't even one iota of an inference. She
16 has admitted she never had it in her possession.
17 I listened to that with amazement, the testimony.
18 I didn't know that was going to come out but it
19 came out, and I remember from my law school days
20 the delivery, and I immediately did my research
21 and looked at the section.

22 THE COURT: How long ago did you
23 go to law school?

24 MR. DeLORENZO: 1959.

25 THE COURT: You have got a good memory

1 that you happen to remember some particular part of
2 your law school training.

3 I don't know, maybe we'd better hold
4 you. I just had ten minutes to look at it quickly.

5 MR. O'SULLIVAN: I think that is best.

6 THE COURT: There are those things
7 quickly you should check out your own notes and
8 what proof you think you have, otherwise, I deny
9 the rest of your motion. But under the Taylor Case,
10 and that is a leading case, 464 F 2nd 240, it is
11 my judgment, at least to the rest of it, giving
12 it to the jury to determine credibility, weigh the
13 evidence and draw a justifiable inference to the
14 facts that a reasonable person might fairly conclude
15 guilt here beyond a reasonable doubt.

16 That is one of the classic cases.
17 That came out of this District Court and establishes
18 that rule as to the rest of your motion. I make
19 that judgment as my conclusion. So the only thing
20 I am leaving open is the one on Uniform Commercial
21 Code.

22 MR. DeLORENZO: All right.

23 THE COURT: We will hold that off
24 until tomorrow.

25 MR. O'SULLIVAN: May I ask the Court

1 if we could get the court reporter to give us
2 Mrs. Spoor's testimony today so Mr. DeLorenzo and
3 I --

4 THE COURT: You have got to persuade
5 the court reporter of that. He is right here.

6 MR. O'SULLIVAN: I may be confused
7 as to what she said here.

8 THE COURT: He ought to charge you
9 double time if he does, but I'm not going to direct
10 it by the Court.

11 MR. DeLORENZO: Your Honor, can I
12 have that citation you gave me?

13 MR. O'SULLIVAN: I have it.

14 THE COURT: Wolder against Cir,
15 493 F 2nd 608. And that does involve execution of
16 this particular 8-309. There is a footnote on
17 page 612 or 613, one of those pages.

18 So tomorrow morning we will start
19 at 9:30.

20 MR. DeLORENZO: I will have one
21 witness so that we will get here earlier for
22 your ruling, your Honor.

23 THE COURT: Do you want to get here
24 -- I don't care -- 9 o'clock?

25 MR. O'SULLIVAN: 9 o'clock.

1 MR. DeLORENZO: All right, that is
2 agreeable, Judge.

3 THE COURT: All right.

4 (Whereupon, the proceedings were
5 adjourned for the day.)
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1 NOVEMBER 25, 1975

2 (The following took place in chambers
3 of Hon. James T. Foley

4 THE COURT: This is for the benefit
5 of the Court of Appeals, Second Circuit, to indicate
6 the trials and tribulations of trial judges which
7 sometimes come on at unexpected times. So I am now
8 in chambers with the attorneys in this criminal case,
9 United States against Droms, 75-CR-47.

10 Mr. DeLorenzo is here, attorney for
11 the defendant, and Mr. O'Sullivan, Assistant United
12 States Attorney for the Government.

13 I have already received and read the
14 brief of Mr. DeLorenzo. The pages aren't numbered.
15 I think it is three pages. And I have been supplied
16 the testimony of the particular witness that we
17 thought was important in the solution of this legal
18 question we have, Martha Spoor. And I want to thank
19 Mr. McGloine, who is now taking this transcript,
20 for working last night and getting out this transcript.

21 So what we did yesterday was adjourn
22 at 4 o'clock or so to give ourselves more time to
23 check out the challenge made by Mr. DeLorenzo that
24 there was not an actual transfer of this stock
25 certificate involved in this case by any delivery

1 being affected to Martha Spoor.

2 Now, I assume both lawyers are ready
3 to elaborate further on their positions in regard
4 to the question we have, and I think I should hear
5 Mr. DeLorenzo first.

6 As I said, I did read your brief.

7 MR. DeLORENZO: Yes, and in view of
8 that, your Honor, I would like to make a few more
9 comments.

10 The motion is two-fold in a sense
11 that it is addressed to the fact that there has
12 been no value proven of this stock at the time of
13 the alleged transfer. Now, that is meaningful in
14 the sense that we first had to determine when the
15 transfer took place because it is important that
16 the transfer of this stock take place prior to
17 Mr. Droms signing the second financial statement
18 in connection with the second offer and compromise
19 which was some time in April of '69.

20 So the burden is upon the Government
21 to prove that the stock in question was actually
22 transferred prior to the time he signed that
23 document and it had a value of \$500. The statute
24 on this is very clear. The Uniform Commercial Code
25 which is formerly the Commercial Property Law,

1 Section 162, states that there must be a delivery of
2 the stock certificate. You have to relinquish
3 control of the stock certificate. It is like a trust
4 under common law if you remember, your Honor, you
5 had to have delivery of the bankbook.

6 THE COURT: I always had trouble
7 with trusts. Let's talk about the Uniform
8 Commercial Code. You are talking about 8-309?

9 MR. DeLORENZO: Yes.

10 THE COURT: And related to that,
11 of course, it is really a definition of delivering.
12 It is 8-313.

13 MR. DeLORENZO: Yes. I don't have
14 my book with me this morning. If I could look at
15 yours, there is something there I wanted to comment
16 on, Judge, there is an extra one. Thank you.

17 In connection with 8-313, the
18 delivery occurs when he or a person designated by
19 him acquires possession of a security. No proof
20 of that. Or (b) or his broker acquires possession.
21 No proof of that. (c) his broker sends him
22 confirmation. No proof of that.

23 With respect to a security to be
24 delivered while still in the possession of a third
25 person when that person acknowledges he is holding

1 it for the purchaser. No proof of that. Or
2 appropriate entries
3 are made under Section 8-320. No proof of that.

4 So none of the items mentioned in
5 8-313 of the Uniform Commercial Code have been
6 introduced into evidence to show any type of
7 delivery.

8 So it is our position that there was
9 no delivery, and at least there is no delivery
10 proven prior to the execution of the second financial
11 statement, and I would move for dismissal of that
12 on the two aspects, value not being proved and no
13 proof of delivery.

14 THE COURT: Your motion in that
15 regard is only addressed to that particular part,
16 the disposition of the assets that is charged in
17 the indictment.

18 MR. DeLORENZO: Yes, your Honor.

19 THE COURT: I think I ruled on the
20 other one, the income charge.

21 MR. DeLORENZO: Yes, you did,
22 yesterday.

23 THE COURT: Understated his income.

24 MR. DeLORENZO: Yes, you ruled on
25 that yesterday on the Taylor Case.

1 THE COURT: Mr. O'Sullivan, now it
2 is your turn. I assume you had time to look over
3 these propositions. Let me know what you think.
4 You have got to support your case here, this aspect
5 of it.

6 MR. O'SULLIVAN: First of all, the
7 Government's position is that this difference is
8 simply a harmless variation between the indictment
9 and the proof. The two primary functions of an
10 indictment are to inform an accused of the charges
11 against him so that he may prepare his defense and
12 to avoid double jeopardy. Whether a variation
13 between the indictment and the proof is fatal to
14 the prosecution will depend upon determining whether
15 the substantial rights have been adversely affected,
16 United States versus Danna, 450 F 2d 1201, Second
17 Circuit 1971, Judge Moore citing Berger versus the
18 United States, 295 US 7855, Supreme Court, 62,
19 1935, unless the substantial rights of an accused
20 have been prejudiced, a variance between indictment
21 and proof is immaterial.

22 A variance between indictment and
23 proof is harmless where defendant does not show
24 that variance impaired its ability to defend himself
25 or failed to identify the nature of the charge.

1 United States versus Evans, 398
2 F 2d, 159, Third Circuit, 1968. Giraud versus
3 United States, 348 F 2d, 820.

4 THE COURT: I have had contact with
5 all those cases, but are you admitting there is a
6 variance here?

7 MR. O'SULLIVAN: I'm saying it
8 doesn't make any difference.

9 THE COURT: That is what I want to know.
10 Are you saying there is one? You say it won't make
11 any difference. You are practically getting to
12 the point and saying even if there is one. Is there
13 a variance? As I read your indictment, the
14 integral part of it is that you say he disposed of
15 this asset, which at the time of disposition had
16 a value in excess of \$500, by transfer of title of
17 said asset to another for less than full value.
18 That is the way the indictment reads, and that seems
19 to be the basis for your charge here that there is
20 a violation of Title 26.

21 MR. O'SULLIVAN: Defense here is
22 saying that you can't prove this lie because of this
23 lie. It is like saying you can't prove you murder
24 him because --

25 THE COURT: What evidence do you have

1 to counter what he says that you haven't proven
2 value, and what evidence do you have that indicates
3 directly or by inference, we can have inferences
4 in criminal cases, that there was a delivery?

5 MR. O'SULLIVAN: I will make this
6 argument --

7 THE COURT: Or at least the jury
8 can weigh the facts in that regard.

9 MR. O'SULLIVAN: All right, I will
10 make this argument: the state law under Uniform
11 Commercial Code 8-313 provides that delivery occurs
12 when under succession, a person designated by him,
13 acquires possession of a security. Commentary to
14 that section, it says the basic purpose of the
15 section is to define the concept of delivery and
16 to make clear that there are many acts short of
17 exchange of physical possession which will have the
18 legal consequences of a delivery. And in her
19 testimony, Mrs. Spoor characterizes the money she
20 contributed to the corporation as an investment.
21 In the transcript, page 17, that she had an
22 agreement with Mr. Droms that in exchange for these
23 contributions, that the business would be hers.
24 The transcript, on page 21, she says she was not
25 a party to the agreements between Mr. Droms and

1 Mr. Kolakowski but had a separate agreement --

2 THE COURT: Slow down for me to
3 understand you and for the court reporter to get it.

4 MR. O'SULLIVAN: She had a separate
5 agreement with Mr. Droms whereby he was to transfer
6 the business to her after he acquired it from
7 Mr. Kolakowski.

8 Accordingly, the relationship of
9 agreement between Mr. Droms and Mrs. Spoor was in the
10 nature of a partnership pursuant to New York State
11 Partnership Law Section 10, 1, which provides that
12 a partnership is an association of two or more
13 persons to carry on as co-owners of business for
14 profit.

15 The partnership arrangement that she
16 has with Mr. Droms is that if she invests her money
17 in the form of contributions to the corporation to
18 keep the business going, he will transfer the
19 corporation to her when he acquires it.

20 Therefore, since every partner is an
21 agent of the partnership pursuant to New York State
22 Partnership Law Section 21, Subdivision 1, Mr. Droms
23 acts as her agent when he acquires possession of
24 stock in her name, and therefore, delivery has
25 occurred under the Uniform Commercial Code 8-313.

1 Now, the case that the defendant
2 cites in support of his position, I don't think
3 decides the issue. That case --

4 THE COURT: What is the case?

5 MR. O'SULLIVAN: Who has the greater
6 property interest, the distinction between who has
7 the property and who has the possession.

8 THE COURT: What case?

9 MR. O'SULLIVAN: He is talking about
10 in re Broomhill, Killough & Company.

11 THE COURT: What citation?

12 MR. O'SULLIVAN: This is 47 Federal
13 Reporter, 948, 1930.

14 THE COURT: That is the old case he
15 talked about?

16 MR. O'SULLIVAN: Yes.

17 Now, there the claim was that the
18 purchaser of stock obtained better title to it than
19 the seller of the stock had on the theory that they
20 would purchase for value without notice.

21 However, since they purchased from
22 the seller prior to his purchase from the title owner
23 and since he never subsequently acquired good title,
24 they could not acquire better title than he had
25 since they had notice that his title had not been

1 prospect.

2 Now, that is the basis for that
3 holding in that court. The court went on to say
4 that it did not think that the mere placing of the
5 stock and new names were sufficient to the title
6 of the holder who had never passed title according
7 to the meaning of Section 162 of the New York
8 Personal Property Law, the predecessor Fucca 309,
9 but it did not decide the issue of whether the
10 holder or the owner of the stock had better title
11 to the asset.

12 Now, the United States Supreme
13 Court in Commissioner of Internal Revenue versus
14 Court Holding Company, 324 US 332, 65, Supreme
15 Court 707, 1945.

16 THE COURT: 335?

17 MR. O'SULLIVAN: US 324, US 332.

18 THE COURT: All right.

19 MR. O'SULLIVAN: That court holds
20 that the tax consequences which arise from the sale
21 of property are not finally to be determined solely
22 by means employed to transfer legal title, but
23 rather every transaction must be viewed as a whole
24 and each step from commencement of negotiations
25 to consummation of sale is relevant.

The court, in looking past the conduit passing of title to avoid the corporate tax, established the policy that to permit the true nature of a transaction to be disguised by mere formalities which exist solely to alter tax liability would seriously impair the effect of the administration of tax policies of Congress.

THE COURT: Well, do you think that these statutes of the Uniform Commercial Code apply to the transfer in question here, those definitions, New York case law and what constitutes a transfer that you have to have delivery, do you think it applies to this criminal case?

MR. O'SULLIVAN: No, I do not think that section applies to the rights of the parties. As to the rights of the parties, it does not affect the rights of the third party, such as the Federal Government seeking to collect the tax.

1 THE COURT: We are not seeking to
2 collect tax. You are trying to convict this man of
3 a charge, of a crime. Do you think that the
4 Uniform Commercial Code definition on transfer,
5 on what constitutes a transfer, that there has to
6 be delivery, is involved in this case? Because you
7 state in your indictment that there was transfer.

8 MR. O'SULLIVAN: Well, I think the
9 comment, the official comment under that section --

10 THE COURT: Under what section?

11 MR. O'SULLIVAN: Under 8-309.

12 THE COURT: All right.

13 MR. O'SULLIVAN: That is the purpose,
14 to effect a valid transfer of that investment
15 security between the parties to the transfer.
16 The Wolder Case, Wolder versus Cir, 493 Fed
17 Section 608, Second Circuit, 1974 would apply the
18 principle that the state law, though controlling
19 on issue of a taxpayer's legal rights to property,
20 does not determine the characterization of issue
21 for purposes of the Federal Tax Law.

22 MR. DeLORENZO: Your Honor, not to
23 interrupt him, but we are not here on tax law.
24 This is saying that this man disposed of an asset.
25 Good law controlling is the Uniform Commercial Code.

1 We are sitting in New York.

2 THE COURT: The question I raise is
3 whether that applies under the Erie Doctrine.
4 Of course, City of New York, that is what you
5 specifically say, whether that applies on the
6 Federal income tax prosecution which is based on
7 Title 26, a Federal code ~~was~~ in they could have
8 their own definition of what transfer is.
9 They don't need the UCC definition. That is the
10 point I'm trying to make with him.

11 MR. DeLORENZO: I don't know the
12 case offhand, Judge, but I think you will agree
13 with me, if you have no Federal law that applies,
14 you apply the law where you are sitting.

15 THE COURT: Civil matters, usually.
16 I am not sure it applies in this criminal matter,
17 except I am at the stage where I am thinking that
18 it does. I don't know.

19 But, no, I have gone over it and
20 I think the substance of the challenge, and
21 sometimes when I have these conferences in chambers,
22 to indicate that there is substance, then things
23 do happen in the Court of Appeals, because at
24 least it gave me a problem. But I think that I
25 am at the stage, particularly after reading the

1 testimony of Mrs. Spoor, because Mr. DeLorenzo, of
2 course, points up my questions in which I was quite
3 precise about it, but I think there are other parts
4 of her testimony that leave enough variance for a
5 jury to decide her credibility, particularly
6 because she was called by the Government but she
7 was treated in some respects as a hostile witness
8 and was impeached, or the endeavor was made to
9 impeach her at certain times. And the pages that
10 I marked after reading it hurriedly this morning
11 are page five of Mrs. Spoor, who testified on
12 November 24th, 1975, which was yesterday. And
13 there she states that she did acquire the ownership
14 of Prestige Realty of the Capital District
15 Corporation. Maybe from that it could be inferred
16 that there was an actual stock transfer.

17 MR. DeLORENZO: Well, your Honor,
18 again --

19 THE COURT: I'm going to state this
20 now, then you can state your position.

21 The other page is page 21, and the
22 witness testifying talks about the verbal agreement
23 and so forth. She says at the conclusion of one
24 statement, "But then the business would be mine."
25 Again, in my judgment, being sufficient for a jury

1 to weigh on whether there was delivery of stock
2 and whether the ownership was finally accomplished
3 by such delivery.

4 The other pages, and these are more
5 precise because most of it is minor, pages 24 and
6 25, when she said she did not have -- now I asked
7 her on page 25, "Did you have possession of that
8 stock certificate?" and she said, "No, sir, I never
9 saw it."

10 "The Court: You never saw it?

11 "The Witness: I don't believe, I
12 don't recall seeing it."

13 I don't think that is an absolute
14 at all. That again leaves the question of her
15 credibility for the jury and whether the stock was
16 received.

17 MR. DeLORENZO: How about the
18 question I asked, Judge?

19 THE COURT: If you refrain a minute,
20 then you can have your turn.

21 And then there is a question and
22 answer. Of course, I don't want to take them out
23 of context. It is cross-examination, and the
24 question is, "So the stock that was turned over
25 to you that was introduced here that you say you

1 never received, there was no agreement to turn that
2 over to you which was in writing?

3 "Answer: That's true, there was
4 nothing written."

5 Which could be weighed and evaluated
6 as though there could have been an oral agreement
7 that might have some effect and bearing on the
8 question we have here of delivery.

9 The important case that I find, and
10 this was referred to in the Wolder Case by
11 Judge Osmond when he wrote it in 1974 is Ginsberg
12 against Cir, and that is 305 Fed. 2d 664 at
13 page 668, and it goes into these questions, factual
14 propositions involved in delivery and acceptance
15 and in that case the tax courts made a finding,
16 and there is also reference in there which is in
17 this case, that as far as the prosecution is
18 concerned, I don't know whether the testimony
19 came out on it, that the stock certificate that
20 was endorsed, there is no question about its
21 endorsement, was in the possession of Attorney
22 Parisi, I think it was, and in that case it talks
23 about probably an attorney could be considered
24 under certain circumstances as an agent of the
25 transferee for the purpose of holding the certificate.

1 So for those reasons, and the
2 question does have substance, and that is why
3 I hesitated and took time to review it, and I
4 think that it is sufficient in my mind to deny
5 the motion, particularly on the ground, I think
6 there is sufficient question of credibility
7 involved as to the actual delivery of the stock
8 certificate after it was endorsed.

9 So now, Mr. DeLorenzo --

10 MR. DeLORENZO: Judge, you didn't
11 answer the motion I made, that it's got to be
12 proven before the second offer was signed. There
13 is no proof here when it was done.

14 Now, let's assume it was done.
15 There is no proof in this record that it was done
16 before the second offer was signed. There is no
17 proof.

18 THE COURT: The second offer was
19 signed when?

20 MR. DeLORENZO: April 1969. Each
21 and every element of the crime must be proven
22 by the Government. They haven't proven that,
23 Judge, they haven't proved value. Where have they
24 proven value?

25 THE COURT: I think value is proven,

1 at least satisfactorily, at this stage, that there
2 is enough for a jury to weigh beyond a reasonable
3 doubt --

4 MR. DeLORENZO: Value at what time,
5 Judge?

6 THE COURT: What she talked about,
7 that she was giving the money throughout, that he
8 was buying the company, \$50 a payment and so forth,
9 amounting to \$10,000.

10 I do think value is not as serious
11 proposition as delivery.

12 MR. DeLORENZO: What if the stock
13 was only worth \$250, then you don't have to report
14 it under that question.

15 THE COURT: I think there is evidence
16 here for a jury.

17 MR. DeLORENZO: Where is the evidence?
18 Where is the evidence of value at the time of the
19 alleged transfer?

20 THE COURT: \$10,000 was paid.

21 MR. DeLORENZO: The transfer to
22 Martha Spoor, when it was transferred to Martha
23 Spoor, where is the evidence of value?

24 THE COURT: She said she paid \$3500
25 over a period of time, so that is more than \$500

1 for a jury.

2 MR. DeLORENZO: But when was it
3 transferred to her, and when it was transferred to
4 her, what was the worth? I haven't had an answer
5 to those questions.

6 THE COURT: They may be questions
7 for the jury. Are you cognizant of these problems
8 we do have here, Mr. O'Sullivan?

9 MR. O'SULLIVAN: Yes.

10 THE COURT: I mean, they are yours,
11 at least in my judgment, but I made my ruling.

12 MR. DeLORENZO: I take an exception
13 to the entire ruling, your Honor.

14 THE COURT: I have given it time and
15 I am satisfied that I spent enough time with it.
16 So now we have your requests to charge to go over
17 and I think we might as well do it now.

18 And I wanted to wait on ruling on
19 those until we canvassed the law and I read the
20 testimony of Mrs. Spoor. So we have to do this
21 under our particular rule that controls.

22 And first I will take requests to
23 charge from Mr. DeLorenzo.

24 I will ask you, Mr. O'Sullivan, what
25 you think of number one?

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATE OF AMERICA,

Plaintiff-Appellee,

-against-

W. BALDWIN DROMS,

Defendant-Appellant.

AFFIDAVIT OF
SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF SCHENECTADY) ss.:

RICHARD H WEISKOPF, being duly sworn, deposes and says:
that he is over the age of 18 years; that he served the
within Brief and Appendix of the Defendant-Appellant upon
the Honorable James M. Sullivan, Jr., United States Attorney,
Northern District of New York, United States Post Office and
Courthouse, Albany, New York, 12207, Attention: Thomas P.
O'Sullivan, Esq., Assistant United States Attorney, on the
13th day of November, 1976, be depositing a true and correct
copy of the same properly enclosed in a post-paid wrapper at
the Post Office at Liberty and Jay Streets in the City of
Schenectady, New York, directed to said attorney, respectively,
at said address, respectively mentioned, above, that being the
address within the state designated for that purpose upon the
last papers served in this action or the place where the above
then resided or kept offices, according to the best information
which can be conveniently obtained.

Sworn to before me this
13th day of November, 1976.

RICHARD H. WEISKOPF

Jacqueline Marie
Notary Public